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Judgment-Civil Action for Perjury as Collateral Attack

JUDGMENT—CIVIL ACTION FOR PERJURY AS COLLATERAL ATTACK.—Appellant previously had sued appellee Pope alleging damage of $12,500 due to personal injuries caused by appellee's negligence. Appellee, Jobes, a physician, was called by Pope as an expert defense witness and testified that appllant's injuries were simulated ones. There was a verdict for Pope. In the instant complaint, appellant joined the physician, the prior defendant Pope, and an indemnity insurer as defendants and alleged that defendants had conspired to make a false and malicious defense to the prior personal injury action through perjured testimony and that the testimony of appellee Jobes was false, thus damaging appellant to the extent of $12,500. Separate demurrers by appellees for insufficient facts were sustained. Appellant refused to plead further. Held, to permit the maintenance of an action for damages against an adverse witness on the ground that a previous defeat in a tribunal of competent jurisdiction was due to false testimony, would be sanctioning collateral attack on judgments and lead to endless litigation.[1]

The instant case presents two problems: (1) Can a civil action for perjury be maintained? (2) If not, what relief is available to a party under these circumstances, assuming his allegations to be provable? Added to the first

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21 Indiana Trust Co. v. Griffith (1911), 176 Ind. 643, 95 N. E. 573, 575.

22 Burns (1933), sec. 18-1204.

23 Freifield, Investment of Trust Funds, 5 Cin. L. Rev. (1931), 1, at 26 and 51.

[1] Hermon v. Jobes (1935), 198 N. E. 316 (Ind. Sup.).

question is whether such action may be maintained under an allegation of conspiracy to use perjured testimony.

In Indiana, as in the great majority of states, no action lies to recover damages caused by perjury.[2] The same is true of subornation of perjury.[3] But when this action is linked with a charge of conspiracy, it loses its simplicity and confronts apparently conflicting doctrines. On the one hand are such statements as are found in *Verplank v. Van Buren*,[4] "The false testimony is not the sole moving factor in the action. The fraudulent purpose or intent, formed before the accounting and trial, and the false entries in the books of account are the chief basis of the cause of action. The acts of the defendants upon the trial are but a part of an entire transaction." Under such reasoning, the court there allowed recovery on the ground of a conspiracy to defraud even though the final acts were false testimonies at a trial. On the other hand are the cases which hold that what one may do lawfully alone, two or more may lawfully agree to do jointly.[5]. On analysis, however, the conflict resolves itself. There must be tortious conduct by at lease one of the conspirators, or none will be liable.[6] The facts of the Verplank case show one of the defendants to be guilty of the tort of deceit and thus the conspirators were jointly liable. Although procuring a judgment through perjured testimony may be fraudulent, the absolute immunity of a witness from civil liability therefor precludes any tortious act.[7]

It is submitted that the principal case is in accord with the almost unanimous weight of authority in denying a cause of action for damages under these facts. A prior judgment cannot be so impeached and the policy against subjecting parties and witnesses to such further litigation is obvious. So long as the former judgment stands, it is conclusive as to the facts and law therein decided.[8] This implies, and the instant opinion suggests, that the appellant's remedy would be a direct action to set aside the judgment, since it is, in effect, alleged to have been procured by fraud.[9] But just how is this to be done? Even where an equitable action to set aside a judgment for fraud is still used, the great majority of cases hold that perjury is not grounds for equitable relief.[10] Nor is it sufficient "mistake, inadvertence, surprise, or

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[2] Grove v. Bradenburg (1844), 7 Blackf. 234, Godette v. Gaskill (1909), 151 N. C. 52, 65 S. E. 612, 24 L. R. A. (N. S.) 265, Stevens v. Rowe (1880), 59 N. H. 578, Cunningham v. Brown (1846), 18 Vt. 123, Shaub v. O'Ferrall (1911), 116 Md. 131, 81 Atl. 789, 39 L. R. A. (N. S.) 416.

[3] Young v. Leach (1898), 27 App. Div. 293, 50 N. Y. S. 670; Peck v. Woodbridge (1808), 3 Day (Conn.) 30; Taylor v. Bidwell (1884), 65 Cal. 489, 4 Pac. 491.

[4] (1879), 76 N. Y. 247. Discussed in principal case.

[5] Rowan v. Butler (1908), 171 Ind. 28, 85 N. E. 714; Kimbal v. Harmon (1871), 34 Md. 407, Page v. Parker (1861), 43 N. H. 363, DeWulf v. Dix (1900), 110 Ia. 553, 81 N. W 779.

[6] Harper, Law of Torts, (1933) sec. 302.

[7] Harper, Law of Torts (1933), sec. 9. "Privilege affords an immunity from liability for the legal consequences of conduct which, but for the privilege, would be tortious."

[8] Shultz v. Shultz (1894), 136 Ind. 323, 36 N. E. 126, Horner v. Schinstock (1909), 80 Kan. 136, 101 Pac. 996, 23 L. R. A. (N. S.) 134.

[9] For a discussion of distinctions made between intrinsic and extrinsic fraud, see Freeman, Judgments (5th ed.), Vol. 3, secs. 1225 and 1233.

[10] Freeman, Judgments (5th ed.), Vol. 3, sec. 1241, Hitt v. Carr (1921),

excusable neglect."[11] Again, that the false testimony was procured by a conspiracy does not aid the appellant's position.[12] Thus, any proceeding to vacate the judgment as suggested by the court is also closed to the appellant, so long as the fraud involved consisted of false testimony. Unless appellant had taken advantage of a proper objection and ruling thereon which could have been the basis of a motion for a new trial[13] to the lower court, it is further submitted that he has foregone the only remedy he had if false testimony was used and he was unable properly to impeach the witness at the trial.[14] Oddly enough, when the state institutes prosecution for perjury or other misconduct in procuring a judgment, it is not a collateral attack, since it is said the validity of the judgment is entirely unquestioned and unaffected.[15] H. A. A.

77 Ind. App. 488, 130 N. E. 1, Pepin v. Lautman (1901), 28 Ind. App. 74, 62 N. E. 60.

[11] Burns' Ann. St. 1933, sec. 2-1068, Freeman, Judgments (5th ed.), Vol. 1, sec. 235; Pepin v. Lautman (1901), 28 Ind. App. 74, 62 N. E. 60.

[12] Freeman Judgments (5th ed.), Vol. 3, p. 2585; Pepin v. Lautman (1901), 28 Ind. App. 74, 62 N. E. 60; Nesson v. Gilson (1916), 224 Mass. 212, 112 N. E. 870. Cf. Nugent v. Metropolitan St. R. Co. (1899), 46 App. Div. 105, 61 N. Y. S. 476.

[13] Burns' Ann. St. 1933, sec. 2-2401.

[14] If he did not discover the perjury until after the 30 day period for a motion for a new trial had expired, Burns' Ann. St. 1933, sec. 2-2405 may still give a remedy upon complaint filed not later than the second term after the discovery of the specification for a motion for a new trial.

[15] Freeman, Judgments (5th ed.), Vol. 1, p. 606, United States v. Bradford, 148 Fed. 413.

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THE EDITOR.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912.

On Indiana Law Journal, published bi-monthly, at Indianapolis, Indiana, for October 1, 1936.

State of Indiana }
County of Marion } ss.

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Thomas C. Batchelor, who, having been duly sworn according to law, deposes and says that he is the Business Manager of the Indiana Law Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 411, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher—Indiana State Bar Association, Union Title Bldg., Indianapolis, Indiana.

Editor—Alfred Evens, Bloomington, Indiana.

Business Manager—Thomas C. Batchelor, Union Title Bldg., Indianapolis, Indiana.

2. That the owner is: (If owned by a corporation, its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one per cent or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member, must be given.)

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President, Albert Harvey Cole, Peru, Indiana.

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3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.)

None.

THOMAS C. BATCHELOR, Business Manager.

Sworn to and subscribed before me this 23rd day of September, 1936.

(Seal.) LOIS M. SCHMIDT.

My commission expires Feb. 11, 1940.